Supreme Court, U.S.
FILED
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No. 95-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents urge that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered 31 August 1995 be denied for the reasons set forth below.

STATEMENT

A. Comment On Petitioners' Request that this Petition be Held Pending Decision in *44 Liquormart v. Rhode Island*, No. 94-1140 (Argued November 1, 1995)

On November 1, 1995, this Court heard argument in *44 Liquormart Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (No. 94-1140). The question presented in that case is: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages?" 115 S. Ct. 1821. The First Circuit upheld the prohibition because it found "inherent merit in the State's contention that competitive price advertising would lower prices, and that with lower prices there would be more sales," 39 F.3d at 7, and because the court determined the state was aided in satisfying its burden under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) by an added presumption of constitutionality deriving from the Twenty-First Amendment. 39 F.3d at 7.

By no means should the petition for certiorari in the instant case be held pending this Court's decision in 44

Liquormart. A summary reconsideration order would not be warranted in this case even if this Court reverses the First Circuit.

The Fourth Circuit did not mention, much less rely upon, the Twenty-First Amendment in concluding that Baltimore's enactment satisfied the *Central Hudson* test. Secondly, while the Fourth Circuit found a "logical nexus" between Baltimore's objective of reducing underage drinking and a prohibition against alcohol ads on billboards as a means of achieving that objective, *App.* 16a,[1] that conclusion is entirely consistent with this Court's identical conclusion that there is "an immediate connection between advertising and demand for electricity," *Central Hudson*, 447 U.S. at 569, and its repeated statement that restrictions on commercial speech may in appropriate circumstances be sustained based on "common sense," *e.g., Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2378. *See also Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984) (common sense alone, whether or not supported by scientific evidence, supports state's conclusion that ban of alcohol ads on billboards will directly advance state's interest in reducing consumption).[2]

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[1] The designation "*Pet.*" refers to the petition for certiorari herein, and the designation "*App.*" refers to the appendix following the petition.

[2] The Fourth Circuit did not need to rest its decision upholding Baltimore's enactment entirely upon the inherent link between advertising and consumption, although that would have been a sufficient basis for upholding the law, because Baltimore generated a compelling legislative record, summarized *infra*, demonstrating that its law will directly and

Indeed, the Fourth Circuit was openly skeptical about the First Circuit's acceptance of the state's "common sense" argument in *44 Liquormart*, and questioned whether the relationship between price advertising and demand is any way more "inherent" than the relationship between disclosure of alcohol content and "strength wars" was found to be in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995). *See App.* 17a-18a, n.5.

Holding the instant petition for certiorari pending decision in *44 Liquormart*, or ordering reconsideration in this case in the event of a reversal of the First Circuit, would constitute a departure from this Court's practice and would unfairly delay implementation of Baltimore's enactment.[3] *Henry v. City of Rock Hall*, 376 U.S. 776, 777 (1964); *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting) (entry of a summary reconsideration order is not appropriate "unless the intervening decision has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result").

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materially advance its interest in promoting the temperance of minors. The judgement of the Fourth Circuit rests on both sound reasoning and substantial empirical support. *Cf. Turner Broadcasting System v. F.C.C.*, 114 S. Ct. 2445, 2471 (1994) (in excercising independent judgment when First Amendment rights are implicated Court will nevertheless accord substantial deference to predictive judgments of the legislature).

[3] Baltimore's law had an effective date of February 5, 1994. *App.* 4a. Petitioners challenged the enactment before its effective date, and Baltimore has consented to a stay of enforcement until Petitioners' appeal rights are exhausted.

B. Comment on Petitioners' Assertion Concerning the Scope of Judicial Review by the Courts Below

Petitioners perceive that the district court and the Fourth Circuit both eschewed the appropriate quality of independent judicial review and instead indulged the Baltimore City Council in acts of "rubber-stamping." *Pet.* 21. Petitioners' view of the scope of judicial review leads them to the absurd conclusion that the constitutionality of Baltimore's enactment can only be determined at trial after a battle of the experts; such a court battle must inevitably result in Petitioners' favor, they assert, because the evidence which the City Council expressly credited in passing the enactment would not even be admissible under this Court's holding in *Daubert v. Dow Merrell Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). The social science reports credited in the Preamble to Baltimore's enactment must not be considered by the courts, Petitioners argue, because they "would be shown at trial to be unreliable and contrary to the mainstream of scientific thought." *Pet.* 15.

Baltimore's burden under the third and fourth prongs of *Central Hudson* was to "demonstrate" (not necessarily, as Petitioners insist, to prove at *trial*) that its enactment will advance the government's interest in a direct and material way, *id.* at 565; *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *Rubin*, 115 S. Ct. at 1588 (1995); *Florida Bar*, 115 S. Ct. at 2377 (1995), and that its enactment is "narrowly drawn," i.e. "not more extensive than is necessary" to serve the governmental interest, *Central Hudson*, 447 U.S. at 566; *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993); *Florida Bar*, 115 S. Ct. at

2380. Contrary to Petitioners' argument, both of the lower courts correctly articulated Baltimore's burden and then held Baltimore to such burden.

A summary of the legislative record Baltimore relied upon to sustain its enactment is set forth below. Preliminarily, however, it is well to keep in mind that although government may not satisfy its burden under *Central Hudson* with "mere speculation and conjecture," *Edenfield*, 113 S. Ct. at 1798, this Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.' " *Florida Bar*, 115 S. Ct. at 2378 (citations omitted).

C. Summary of the Legislative Record Supporting Baltimore's Enactment

The legislative record consists of (1) the Preamble, (2) the social science reports referred to in the Preamble, and (3) the public testimony considered by the City Council before it passed Ordinance 288. *App.* 5a; 49a.

The problem of underage drinking is well known. Social science reports document the problem nationally and at the state and local level. The National magnitude of the problem is indicated in two reports acknowledged in the Preamble: Report by the United States Surgeon General (*Youth and Alcohol: Dangerous and Deadly Consequences*), and Report by the United States Inspector General (*Youth and Alcohol: Drinking and Crime*). *App.* 53a. The

extent of the problem at the state and local level is documented in the *1992 Maryland Adolescent Drug Survey*, conducted by the Maryland Department of Education, also acknowledged in the Preamble. *App.* 51a.[4]

The City Council considered whether the restrictions imposed by Ordinance 288 would directly advance the governmental goal of promoting the temperance and welfare of minors. First, citing several cases decided by this Court and lower federal courts, the City Council recognized judicial precedents establishing "the positive relationship between advertising and consumption." *App.* 50a. Second, citing *Packer Corp. v. Utah*, 285 U.S. 105 (1932), in which this Court upheld against an equal protection challenge a state law prohibiting tobacco advertising on billboards while allowing it in newspapers and magazines, the City Council recognized that "[o]utdoor advertisements are a unique and distinguishable medium of advertising which subjects [sic] the general public to involuntary and unavoidable forms of solicitation." *Id.* Third, the City Council cited with approval the findings contained in a report of the Prevention Committee of Governor William Donald Schaefer's Drug and Alcohol Abuse Commission, titled *The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking*. *App.* 51a.

Research studies, special reports, position papers and articles in media journals were thoroughly reviewed by the Prevention Committee, in an attempt to determine the

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[4] Petitioners concede that promotion of the temperance of minors in Baltimore City is a substantial governmental interest. *Pet.* 7.

impact of alcohol advertising on underage drinking. JA 853.[5] The Prevention Committee concluded that exposure to alcohol advertising increases the likelihood that young people will develop attitudes favorable to drinking; in turn, those attitudes increase the likelihood that children will drink prior to age twenty-one.

The Prevention Committee's research revealed a number of specific alcohol industry practices that seem to contribute greatly to attitudes favorable to alcohol among youth, including: using advertisements that are especially appealing to children (i.e. cartoon characters); using rock stars and athletes as spokespersons; and associating beer drinking with activities that have great appeal to youth, such as race car driving, rock climbing and water sports. JA 856.

Reports and studies reviewed by the Prevention Committee led it to conclude that alcohol advertisers have settled on the "life-style" approach as the standard and most effective way to promote alcoholic beverage sales. The "most notable and most widely held belief – and therefore expectation – set forth in these advertisements about alcohol is that it is something of a 'magic elixir' that can enhance social and physical pleasure, sexual performance and responsiveness, power and aggression, and social competence." (*United States Department of Health and Human Services Seventh Special Report to the United States Congress on Alcohol and Health*). JA 866. Life-style advertisements extol the generic benefits of

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[5] The designation "JA" refers to the joint appendix filed in the Fourth Circuit.

drinking rather than specific brand characteristics, according to research reviewed in the Prevention Committee report. *Id.*

The alcohol and advertising industries' positions regarding the impact of alcohol advertising on underage drinking were considered by the Prevention Committee *but rejected as being at variance with the finding of independent researchers.* JA 871. The report stated: "It must be noted that both the alcoholic beverage and the advertising industries allege that research shows no correlation between alcohol advertising and underage drinking when, in fact, the overwhelming majority of research studies showed a definite correlation." JA 872.

The report advocated that a public health approach be taken to preventing and reducing underage drinking. JA 856. Ordinance 288 reflects the City Council's deliberate decision to accept recommendation H. of the report:

> H. Encourage local communities to regulate alcohol advertisements on billboards.
>
> Many communities are inundated by billboards that advertise alcohol. Children are exposed to these ads on a regular basis simply by walking to school or playing in their neighborhood. There is no practical means of parental monitoring or limiting of exposure to these "public" advertisements. Local governments can, however, regulate these advertisements in the interest of the public health, limiting the number/density of such advertisements as well as their placement in residential areas, near schools, playgrounds, etc. [JA 860]

Before it enacted Ordinance 288 the City Council held a public hearing, which included testimony of proponents and opponents. JA 1089-1323. One expert testified in support of the bill which became Ordinance 288.

Dr. Mark Crispin Miller, co-Director of the Film and Media Studies Program at Johns Hopkins University, testified that liquor advertisements, including billboards, "deliberately target the young." JA 1134. Dr. Miller informed the City Council that over the last twenty years alcohol "advertising has shifted over toward an emphasis on the young." JA 1138. According to Dr. Miller, liquor advertisers now more than in the past use overt sexual themes. JA 1138-1141. Such themes are particularly effective with young people. *Id.* Dr. Miller testified:

> Those under 18 years old react more favorably to the sexual theme. And I would submit to you that the constant harping on sexual promise in these outdoor ads makes, makes this particularly appealing to the young who cannot help but see these images as they go about their business in the streets. Almost invariably there is an association of the liquor with a kind of masculine provocative, with the availability of women. [JA 1141]

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THIS COURT'S DECISIONS

A. There is Neither Actual Nor Apparent Conflict Between the Fourth Circuit's Decision and This Court's Decisions.

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was animated by a studied application of the standards set forth in *Central Hudson*, and was decided with faithful reference to this Court's most recent pronouncement regarding commercial speech regulation, *Florida Bar*.

The Fourth Circuit's decision neither actually nor apparently conflicts with decisions of this Court. There is a large gulf between what this Court has held in its recent commercial speech decisions and Petitioners' interpretation of those decisions. That this Court has required the government to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree," *Rubin*, 115 S. Ct. at 1592, certainly does not mean that the district court was required to hold a trial to test the validity of the predictive judgments of the Baltimore City Council in this case. Putting aside that the Fourth Circuit found "a logical nexus between the City's objective and the means it selected for achieving that objective," *App.* 16a, a finding based on common sense which is nowhere disputed in the Petition for Certiorari, Petitioners make the novel argument that *Daubert* should have led the lower courts to refuse to even consider the substantial legislative record and legislative findings which were generated before enactment of the challenged

ordinance. *See Pet.* 15. Petitioners' *Daubert* argument reveals the disparity between their view and the actual state of commercial speech jurisprudence. *See, e.g., Florida Bar,* 115 S. Ct. at 2378, *and see Turner Broadcasting System,* 114 S. Ct. at 2471.

This case hardly provides a compelling reason for review on the basis of conflict with decisions of this Court. Without even taking into account the sufficiency of the social science reports credited by the City Council to sustain Baltimore's burden under *Central Hudson,* this Court would easily affirm based upon the obvious common sense relationship between advertising and increased demand. Unless this Court is prepared to fundamentally depart from the methodology it employed to decide *Central Hudson* there is no reason for it to review this case. In *Central Hudson* this Court found "an immediate connection between advertising and demand for electricity," 447 U.S. at 569, and therefore a direct link between the ban on advertising and the state interest in conservation, *id.;* in *Dunagin* the Fifth Circuit stated that "[w]hether we characterize over disposition as following the judicial notice approach taken in *Central Hudson Gas* or following the 'accumulated, common-sense judgment' approach taken in *Metromedia [Inc. v. City of San Diego,* 453 U.S. 490 (1981)], we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban [on billboards advertising hard liquor or wine in Mississippi], whether or not 'concrete scientific evidence' exists to that effect," *id.* at 250; and in the instant case the Fourth Circuit, coming to a similarly based conclusion concerning the correlation between alcoholic beverage advertising and underage drinking, held that "[t]here is a logical nexus between the City's

objective and the means it selected for achieving that objective." *App.* 16a.

* * *

Time and again this Court has spoken concerning government's burden in satisfying the *Central Hudson* third prong, and in so doing has upheld commercial speech restrictions based on legislative records far less complete or compelling than the one generated by Baltimore here. *See, e.g., Florida Bar,* 115 S. Ct. at 2378; *Edge,* 113 S. Ct. at 2704; *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341 (1986); *Metromedia,* 453 U.S. at 511 (plurality opinion of White, J.). Although this Court would easily find the legislative record supporting Baltimore's enactment sufficient to satisfy *Central Hudson,* it would not thereby either clarify the law or introduce any new legal standard.[6]

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[6] Petitioners' blindness to this Court's admonitions that the predictive judgments of legislatures are entitled to substantial judicial deference, and that a legislature "is not obliged, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," *Turner Broadcasting System,* 114 S. Ct. at 2471, leads them to question whether it was appropriate for the Fourth Circuit to have affirmed the district court's resolution of this case at the pleadings stage. *Pet.* 11. The thrust of Petitioners' attack on the dismissal of their cases pursuant to Rule 12(b)(6) melts away, however, when it is remembered that their challenge is to the *facial* constitutionality of Baltimore's enactment, and that "the issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question." *Dunagin,* 718 F.2d at 748 n.8.

"Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have

* * *

Petitioners' argument based on the fourth prong of *Central Hudson* is no more than a mere assertion that the Fourth Circuit erred, without pretense that discretionary review by this Court would be of interest or importance to anyone other than themselves. In any event, there was no error. Baltimore's enactment is well tailored to achieve no more than its substantial objective. Adults are still permitted to receive Petitioners' advertising from signs in commercial areas of the City. The capacity of Baltimore to sponsor an educational campaign to teach children the danger of alcohol does not render the City's restriction of Petitioners' billboards too burdensome. This Court considered and rejected an identical "counterspeech" argument in *Posadas*, and in so doing cited with approval *Dunagin's* rejection of the same argument. 478 U.S. at 344.[7]

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relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note to Federal Rule of Evidence 201. Judicial access to legislative facts should be governed in accordance with the judicial methodology for determining the content of domestic law. The court may make an independent search for persuasive data or rest content with what it has or what the parties present. The parties do no more than assist; they control no part of the process. *Id.*, citing Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-271 (1944). *Compare Metromedia*, 453 U.S. at 509 (despite inadequacy of record proof Court refuses to "disagree with the accumulated, commonsense judgements of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety").

[7] Despite Petitioners' assertion that *Posadas* has been overruled *sub silentio* by *Edenfield*, *see Pet.* 17, *Posadas* is still good law

B. The Governmental Interest Asserted by Baltimore is Exceptionally Strong, and Petitioners have Misstated that Interest.

At all times in this litigation Petitioners have conceded what any reviewing court would of necessity conclude: Baltimore asserts a substantial governmental interest in legislating to promote the temperance of minors. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 500 (10th Cir. 1983), *rev'd on other grounds sub. nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (state interest in reducing the sale and consumption of liquor is "exceptionally strong"); *Dunagin*, 718 F.2d at 747 ("alcohol abuse takes an enormous toll from society and the lives of many people").

Notwithstanding their concession, *Pet.* 7, Petitioners' denigrate Baltimore's purpose in enacting the challenged ordinance and the substantiality of the governmental interest sought to be promoted. Petitioners state:

> In these cases, Baltimore passed its Ordinance because billboard advertising for alcohol beverages is unpopular with a few vocal community groups, who actually may have been motivated by concerns other than underage drinking, such as "community empowerment." [*App.* 21]

Correctly identifying the actual governmental interest animating the legislation is important, however,

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and was quoted with approval in *Rubin*, 115 S. Ct. at 1591. Nor has this Court adopted a "least restrictive means" approach to commercial speech restrictions, although that approach best explains Petitioners' argument. *Florida Bar*, 115 S. Ct. at 2380.

because the protection available for particular commercial expression "turns on the nature both of the expression and the governmental interests served by the regulation." *Central Hudson*, 447 U.S. at 563. Far from Petitioners' assertion that Baltimore's law was passed because of its popularity with "a few vocal community groups," the law was actually passed after Baltimore received a specific delegation of legislative authority from the *Maryland General Assembly* to enact remedial legislation suggested by the *Governor's Drug and Alcohol Abuse Commission*. *App.* 4a-5a; 54a.

The Prevention Committee of the Governor's Commission recommended that to combat underage drinking communities regulate alcoholic beverage advertising on billboards. *Id.* Baltimore's ordinance, therefore, was the result of plenary consideration and approval by both the state legislature and a blue ribbon commission even *before* its consideration and enactment by the City Council of Baltimore. It hardly follows that Petitioners – who mistakenly characterize the harm inflicted by their products and messages as merely "unpopular with some voters," *Pet.* 21 – were the victims of a witch-hunt foisted upon them by a "part-time [legislature] . . . [that] lacked the means to engage in thorough fact-finding." *Id.*

Petitioners cite a *Wall Street Journal* article to the effect that this case is being closely watched by other cities considering regulation of advertising for "unpopular" products. *Pet.* 21. That may be, but in the absence of any conflict between the Fourth Circuit's decision and a decision of this Court or a United States Court of Appeals there is no compelling justification for Supreme Court review. Petitioners' fear that purveyors of "unpopular"

products will become the victims of legislation passed by innumerable legislatures held hostage by "a few vocal community groups" is unsubstantiated. Indeed, one of the most notable purveyors of an "unpopular" product has already decided to *voluntarily* desist from an ad campaign widely criticized as targeting minors. *The Baltimore Sun* reported that: "Advertising icon Joe Camel will be yanked from billboards by cigarette maker R.J. Reynolds amid a hail of criticism that the ads are blatantly aimed at convincing children to smoke." *RJ Reynolds To Pull Joe Camel From Billboards,* Balto. Sun, Oct. 27, 1995, at 4C.

Petitioners' argument touting the importance of this case on the basis of a national increase in restrictions on commercial speech regarding "unpopular" products (i.e. tobacco and alcohol) is significantly undercut when one observes so dominant a speaker as R.J. Reynolds beginning to voluntarily restrict its commercial speech. The possibility that similar self-policing will emerge as a trend among commercial speakers promoting alcohol and tobacco militates against this Court expending precious judicial resources on this case.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE FOURTH CIRCUIT AND DECISIONS OF THE CIRCUIT COURTS INVOLVING THE SAME MATTERS OF LAW AND FACT

As the Fourth Circuit observed before expressly aligning itself with the Fifth and Tenth Circuits, "[e]ach circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing

demand." *App.* 17a (citing *Dunagin* and *Crisp*). There is uniformity among the circuits in cases involving the same matter of law and fact as involved here.

The decisions relied upon by Petitioners to demonstrate a conflict among the circuits do not even exhibit conflicting dicta or a conflict in principle with the Fourth Circuit's decision. It is difficult to see how the Ninth Circuit's decision in *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.2d 429 (9th Cir. 1993) can be considered to conflict (even in principle) with the Fourth Circuit's decision when the Ninth Circuit cited *Posadas* with approval and for the proposition that "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised." 14 F.3d at 439 (emphasis added).[8]

It is similarly disingenuous for Petitioners to claim that the Tenth Circuit's approach to commercial speech cases conflicts in principle with that of the Fourth Circuit. Petitioners' reliance on *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 (10th Cir. 1993) (*Coors II*), *aff'd sum nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), is wholly misplaced. In light of this Court having written a plenary decision in the case the decision of the Tenth Circuit is superseded. Yet, even the principles applied in the superseded Tenth Circuit opinion are consistent with the Fourth Circuit's opinion herein. *See Coors II*, 2 F.3d at 357

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[8] *Association of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3240 (U.S. Oct. 2, 1995) is another Ninth Circuit case relying on *Posadas* and otherwise in harmony with the principles expressed by the Fourth Circuit in this case. *See* 44 F.3d at 733.

("*Edenfield* . . . articulates a standard that is consistent with our pronouncements in *Coors I*") *and Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1549-1550 (10th Cir 1991) (*Coors I*) (approving *Dunagin*).

The last case relied upon by Petitioners involved issues of law and fact not remotely similar to those involved in the instant case. In *MD II Entertainment Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994) a law prohibiting, *inter alia*, use of the term "gentleman's club" to advertise a topless bar could not withstand scrutiny under the third prong of *Central Hudson* since it appeared that "[i]n formulating its ordinance, the city relied on *no studies* showing a link between advertising and property values or crime." 28 F.2d at 496 (emphasis added). Baltimore, in contrast, implemented the recommendation of a blue-ribbon commission appointed by the Governor. Insofar as judicial recognition of the link between alcohol advertising and consumption is concerned, however, the Fifth Circuit's decision in *Dunagin*, not that in *MD II Entertainment*, continues to be the last word.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

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